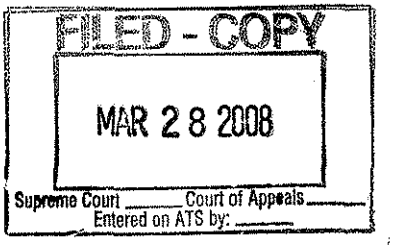
3-28-2008

Justad v. Ward Appellant's Brief Dckt. 34793

IN THE SUPREME COURT OF THE STATE OF IDAHO

WILMA CLAIRE JUSTAD, Plaintiff/Respondent/ Cross-Appellant, vs. RONALD WARD, Personal Representative of the Phyllis A. Gasser Estate, Defendant/Appellant/ Cross-Respondent,	)	No. 34793



BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Kootenai

HONORABLE JOHN T. MITCHELL, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the district court's judgment granting specific performance of an option to purchase real property.

B. COURSE OF THE PROCEEDINGS

A court trial on a second amended complaint was held on October 15, 2007. At the conclusion of the trial the court stated its decision on the record. The parties later stipulated to additional findings, which were adopted by the court at a hearing on November 17. On that same date, the court executed the judgment ordering specific performance of the option to purchase the real property and specifying the terms of that purchase. (R. pp. 111-132; pp. 123-130; 131-136)

Plaintiff then filed a memorandum of cost, which included a claim for attorney fees. Defendant objected to the claim for attorney fees and some of the costs, and a hearing was held on December 17, 2007. A written decision denying Plaintiff's claim for attorney fees was entered on January 11, 2008. Defendant timely filed his notice of appeal, and Plaintiff cross-appealed on the issue of denial of attorney fees. (Supp. R. pp. 8-27 and pp. 30-41; R. pp. 137-139; and Supp. R. pp. 42-44))

C. STATEMENT OF THE FACTS

In 1978 Phyllis Gasser (Phyllis) and her husband John Gasser owned a ranch of approximately 125 acres on the east side of Lake Coeur d'Alene. During May of that year, Phyllis and John Gasser granted Phyllis' sister Wilma Claire Justad (Claire) and her husband R.W. Justad an option to purchase about 10 acres of the ranch. (Ex. A) At the same time, the Gassers sold to Justads approximately 113 acres by a contract for deed. (Ex. 2; Tr. p. 23 and p. 56)

The most pertinent provision of the option agreement states:

> [T]he JUSTAD'S may elect to exercise said Option upon the deaths of both JOHN W. GASSER and PHYLLIS A. GASSER. Provided, that said election shall be exercised *within sixty days of the death of the last to die*, and said election shall be binding upon the Personal Representatives and Trustees and Estates of the Gasser's. If the election is not exercised within said period of time, then this Option shall terminate, together with all rights hereunder.

(Ex. A, emphasis added) John Gasser died in 1984, and Phyllis died on February 19, 2006. (Ex. C)

Ronald Ward (Ron) initiated a probate proceeding for Phyllis' estate by filing an application and the original will on March 20, 2006. (Ex. D and E) A hearing was scheduled on Ron's application for April 11, 2006, and a copy of the notice of that hearing was mailed to Claire on March 21, 2006.

The certificate of mailing on the notice of hearing (Ex. F) states that copies of Phyllis' will and the application were also mailed to Claire on March 21, 2006.

The April 11, 2006 hearing in the probate case was for probating Phyllis' will and appointing Ron as personal representative. (Ex. 13, p. 2, LL. 8-10) Claire's daughter, Jodie Hood, attended that hearing. Much later, at the trial in October 2007, Claire testified that she had instructed her daughter to attend the probate hearing and to exercise the option. A transcript of April 11, 2006 hearing, which was introduced as evidence in this case (Ex. 13), however, reveals that Ms. Hood never said that the option was being exercised.

Jodie Hood did inform the magistrate on April 11, 2006 that she was there on Claire's behalf and that she had her mother's power of attorney. The magistrate continued the probate hearing until June 15, without appointing Ron as personal representative. Written notice of the continued hearing (Ex. G) was mailed to Claire on April 18, 2006.

On the morning of June 15, 2006, prior to the probate hearing, Claire's attorney sent a letter to Ron's attorney. The letter was sent by facsimile at approximately 9:00 a.m. It stated that Claire "has elected to exercise her option immediately." (Ex. 14 and I)

Ron was appointed personal representative of Phyllis' estate at the June 15, 2006 hearing, which was held shortly after 1:00 p.m. Letters Testamentary were file stamped by the clerk on June 16. (Ex. H) Also, on June 16 Claire filed her initial complaint in this case. (R. pp. 10-19)

II. ISSUES PRESENTED ON APPEAL

Three issues are presented by Appellant Ronald Ward. Those issues are:

A. WHETHER THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF'S AGENT (JODIE HOOD) EXERCISED THE OPTION AT THE APRIL 11, 2006 PROBATE HEARING WITHOUT STATING THAT SHE WAS DOING SO.

B. WHETHER THE TRIAL COURT ERRED IN RULING THAT PLAINTIFF'S LETTER OF JUNE 15, 2006, SENT 36 DAYS AFTER THE EXPIRATION OF THE OPTION PERIOD, WAS AN EFFECTIVE EXERCISE OF THE OPTION.

C. WHETHER THE TRIAL COURT ERRED IN SPECIFICALLY ENFORCING THE OPTION AGREEMENT TO PURCHASE REAL PROPERTY, WHICH LACKED ESSENTIAL SALE TERMS, BY CREATING THOSE TERMS.

III. ARGUMENTS

A. THE FINDING THAT CLAIRE EXERCISED THE OPTION AT THE APRIL 11, 2006 HEARING IS NOT SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE.

1.

(Standard of Review)

Findings of fact by a trial court can only be overturned on appeal if those findings are not supported by substantial and competent evidence. *Marshall v. Blair*, 130 Idaho 675 at 679, 946 P.2d 975 at 979 (1997). Independent review can be made, however, when the record is entirely documentary evidence. *Airstream, Inc. v. Cit Financial Services, Inc.*, 115 Idaho 569 at 575, 768 P.2d 1302 at 1308 (1988). The first issue on appeal challenges the trial court's finding on what happened during a probate hearing, and the sole evidence of what happened is in a transcript that is part of the record on appeal. Exhibit 13

2.

(Evidence of the April 11 Hearing)

The April 11 probate hearing was held within 60 days after Phyllis' death. An exercise of the option during that hearing would have been timely.

In attendance at that hearing, besides Ron and his attorney, was Claire's daughter Jodie Hood. It became an undisputed fact established at the trial in this case, held a year and a half later, that the purpose of Ms. Hood's presence at the April 11, 2006 hearing was to exercise the option for Claire. That purpose was not disclosed at the hearing. The transcript, Exhibit 13, clearly shows this. The transcript contains several incomplete statements by Jodie Hood. For example:

> "Um, my mother was Phyllis Gasser's power of attorney and administrator of her estate for many years. Uh, this went on um -- Ron Ward uh, became her um, power of attorney and uh, administrator of her estate without my mother's knowledge. And um, I also -- my mother told -- my mother has --" (Ex. 13, p. 1, L. 25; p. 2, LL 1-6)

> "I'm here just to hear what I -- I was not sure what this court date -- what this court was -- was about. And I flew up here from Boise last night. (Ex. 13, p. 2, LL. 10-12)
>
> Um, my point is, is my mother sold some -- that my mother owns a --" (Ex. 13, p. 2, LL. 13-14)

> "I'm -- I'm sorry, your Honor, I -- I just -- I really was not sure what was going on today. And I wanted to be present to hear what was happening." (Ex. 13, p. 5, LL. 3-6)

The trial court's findings on what happened at the April 11, 2006 probate hearing is on pages 113, 114, and 115 of the trial transcript.* Most salient of these findings are:

> ➢ "Now, that notice of intent to exercise the option, while somewhat incomplete, it was on the record, it was in open court. . . ." Tr. p. 114, LL. 21-23
>
> ➢ "[W]ere it not for Judge Friedlander's interruptions, the statement would've been clearly communicated. It would've been complete." Tr. p. 114, LL. 23-25
>
> ➢ "I am finding as a matter of fact and law that that was adequate notice in and of itself. Without more, this was notice to the Court and it was notice to Ron Ward." Tr. p. 114, L. 25; p. 115, LL. 1-3
>
> ➢ "I also find that. . .Ron Ward knew who Jodie was. She was Claire's daughter. Knew that Claire bought from and paid for an option. . ., knew that Jodie came bearing Claire's power of attorney, and that Jodie made all that clear to Ron Ward. . . ." Tr. p. 115, LL. 4-9
>
> ➢ "It was clear on April 11th, 2006, that Claire was giving notice to Ron Ward. . . ." Tr. p. 115, LL. 12-14
>
> ➢ "[S]o I find that the option was exercised, accepted on April 11th, 2006." Tr. p. 115, LL. 16-17

3.

(Analysis and Argument)

a.

Supporting evidence for two of the trial court's preliminary findings is difficult to locate in the record. Those preliminary findings, are: (i) what Jodie Hood would have said but for the

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* The trial testimony of Jodie Hood did not produce substantial evidence of what happened at the April 11 hearing. Ms. Hood either could not remember that hearing or she was confused about events. Tr. pp. 62-67

magistrate's interruption, and (ii) the only reason for Jodie Hood to attend the April 11 hearing was to exercise the option in Claire's behalf. Even if those findings are accepted, however, the ultimate fact is that Jodie Hood did not state she was exercising the option. What Ms. Hood intended to do or what she might have done are not competent and substantial evidence that the option was exercised. Such speculative evidence is not something a reasonable trier of fact would accept.

b.

Silence generally does not constitute acceptance of a contract offer. *Vogt v. Madden*, 110 Idaho 6 at 9, 713 P.2d 442 at 445 (1985). An option can be defined as an irrevocable offer, which continues for the time stated in the option, granting the optionee the power of acceptance. *Damiano v. Finney*, 93 Idaho 482 at 485, 464 P.2d 522 at 525 (1970), and *Sutheimer v. Stoltenberg*, 127 Idaho 81 at 85, 896 P.2d 989 at 993 (Ct. App. 1995). To exercise an option, something more than silence is required. See, *Shellhart v. Axford, 485 P.2d 1031 at 1032 (Wn. 1971).* Also see *Restatement (Second) of Contracts*, 62(b) (1981), and *3 Corbin on Contracts,* 11.8 (1996).

The mere appearance by an agent at a probate hearing, coupled with the announcement by the agent that she held a power of attorney, is insufficient action to exercise an option to purchase real property.

B. THE JUNE 15, 2006 LETTER, WHICH WAS SENT AFTER THE EXPIRATION OF THE OPTION PERIOD, WAS NOT A VALID EXERCISE OF THE OPTION.

1.

(Standard of Review)

The appellate court exercises free review of the trial court's conclusions of law. The review determines whether the trial court correctly stated the applicable law and whether its legal conclusions are sustained by the facts. *Benninger v. Derifield*, 142 Idaho 486 at 489, 129 P.3d 1235 at 1238 (2006).

2.

(Trial Court's Conclusion)

Sometime after the April 11 hearing Claire retained an attorney for assistance in exercising the option. (Tr. p. 37 LL. 4-7) On June 15, several hours before the rescheduled probate hearing, Claire's attorney sent Ron's attorney at letter stating that she "has elected to exercise her option immediately." (Ex. 14) The trial court held that even though this letter was not within the 60-day option period, it was "timely as a matter of law." (Tr. p. 115, L. 25; p. 116, LL. 1-2) The principal rationale for the trial court's holding was that because Ron was not appointed personal representative until June 15, Claire had no one upon whom to serve notice until that date. (Tr. p. 116, LL. 2-11)

3.

(Analysis and Arguments)

a.

There are two obvious faults with the trial court's rationale. First, the trial court's alternative holding was that Claire had given Ron and the probate court effective notice on April 11, 2006. If the April 11 hearing was appropriate for exercising the option, as the trial court ruled, then Claire clearly did have someone upon whom notice could be given.

A second fault with the court's rationale is that Claire's June 15 letter was sent and received before Ron was appointed personal representative. If Claire had to wait for Ron's appointment to validly give him notice, she did not wait long enough. If it was acceptable to the trial court that the June 15 exercise of the option was four hours before the probate hearing to appoint Ron personal representative, why was it not acceptable for Claire to send such a letter 37 days before that hearing and thus do so within the option period?

The Idaho Supreme Court has held that time is of the essence in an option agreement even if there is no time "is of the essence" language in that agreement. *Southern v. Southern*, 92 Idaho 180 at 181, 438 P.2d 925 at 926 (1968). Claire's June 15 letter was not a valid exercise of the option because the option had expired before that date.

b.

The trial court made reference to Idaho Code section 15-3-103. (Tr. p. 117, LL. 9-10) That statue states that a personal representative is not empowered to act until his appointment

and the court issues letters. Even though a person does not have the power to act, however, notice upon that person can still be effective.

Several provisions in Idaho's probate code contemplate notice prior to the appointment of a personal representative. Section 15-3-301 requires that an applicant for informal appointment declare whether he has received a demand for notice of the appointment proceedings. An interested person can file with the court a demand for notice of a yet to be filed probate under Idaho Code section 15-3-204.

c.

Before Claire's attorney sent the June 15 letter to Ron's attorney, Claire acted without advice of legal counsel. (Tr. p. 52) She believed that to exercise the option she had to notify the court at the time of the probate hearing. (Tr. p. 29, LL. 15-16; p. 36, LL. 1-5) Claire chose to do this by sending her daughter Jody Hood as her agent to exercise the option. (Tr. p. 51, LL. 14-25) She relied upon her own counsel, and the consequences were detrimental. It was after she hired an attorney that she used an appropriate manner for exercising an option.

A person who represents himself in court as a *pro se* litigant is held to the same standards and rules as someone represented by an attorney. *Everhart v. Washington County Road and Bridge Department*, 130 Idaho 273 at 275, 939 P.2d 849 at 951 (1997). So too, a person engaged in a real estate transaction without an attorney should not be evaluated by a lesser standard.

C. THE OPTION AGREEMENT, LACKING IN ESSENTIAL TERMS FOR THE PURCHASE OF REAL PROPERTY, CANNOT BE ENFORCED.

1.

(Requirement of Essential Terms)

Idaho's supreme court has often held that specific performance is not available for an incomplete real estate agreement. *Garner v. Bartschi*, 139 Idaho 430 at 435, 80 P.3d 1031 at 1036 (2003), *White v. Rehn*, 103 Idaho 1 at 2, 644 P.2d 323 at 324 (1982), and *Locklear v. Tucker*, 69 Idaho 84 at 90, 203 P.2d 380 at 383-384 (1949). Also see *Dante v. Golas*, 121 Idaho 149 at 152, 823 P.2d 183 at 186 (Ct.App. 1992). Among the essential terms for a real estate purchase agreement is the manner for paying the purchase price. *Anderson v. Whipple*, 71 Idaho 112 at 123, 227 P.2d 351 at 358 (1951). Also see *Lawrence v. Jones*, 124 Idaho 748 at 751, 864 P.2d 194 at 197 (Ct. App. 1993).

This requirement for complete terms applies to an option agreement. *Dante v. Golas*, *supra.* Also see, *C.H. Leavell and Company v. Grafe and Associates, Inc.*, 90 Idaho 502 at 511-12, 414 P.2d 873 at 876-77 (1966).

2.

(Option/Sale Terms)

The option agreement for which specific enforcement was granted in this case is barren of sale terms. Two sentences are all that express whatever intention the parties may have had: "The purchase price for said property shall be NINETY-SEVEN THOUSAND DOLLARS

($97,000.00), which shall be payable in equal annual installments from the date of exercise of said Option over a ten (10) year period of time, without interest upon the unpaid principal balance" and "If the Option is exercised, as provided for herein, the consideration paid [$100.00] for said Option shall be applied against the purchase price." (Ex. A, p.1)

The real property covered by the option agreement is described as four parcels, which are listed on a page attached to the agreement. (Ex. A, p. 3) One of those parcels, however, was not owned by Phyllis at the time of her death, and the judgment did not include that parcel. (R. pp. 123-124 and pp. 131-132)

Despite the limited terms expressed in the agreement the trial court found that it was sufficiently specific to be enforced and "any remaining contract terms can be applied and are implied by the court." (Tr. p. 111, LL. 18-21) The court created the following to effectuate the sale of real property:

- The first installment payment* was due on April 11, 2006, and a second installment was due on April 11, 2007. Because those isntallments had not been paid, interest on the amounts of those two installments at 12% is owed until those installments are paid. (Tr. p. 121, LL. 15-25; p. 122)
- The credit given for the amount paid as consideration for the option, $100.00, is applied to the last installment payment. (Tr. p. 122, LL. 11-14)
- Claire is to pay all property taxes accruing after April 11, 2006, but not any late fee or penalty. (Tr. p. 122, LL. 20-25; p. 123, LL. 1-9)
- The personal representative of the estate shall deliver a deed when all installment payments have been made. (Tr. p. 123, LL. 10-16)

* The due date of the first installment may be a finding of fact of an ambiguous term in the agreement rather than an implied term created by the court. This is unclear from the contents of the decision. Tr. p. 120, LL. 23-25; p. 121, LL. 1-14

- Prepayment of the installments is permitted, Tr. p. 123, LL. 10-12, but acceleration of payment upon default is not. (Tr. p. 123, LL. 21-25; p. 124, LL. 1-2)

- Claire is entitled to possession of the real property prior to payment of all installments. (R. p. 133, LL. 6-7)

- Ron is not entitled to bring legal action for the unpaid purchase price in the event of default, but limited to strict foreclosure after thirty-day notice. (Tr. p. 123, LL. 10-18; p. 130, L. 25; p. 131 LL. 1-3 and LL. 9-15) Redemption rights, if any, are not specified.

3.

(Analysis and Argument)

a.

The trial court created the sale terms in this case using the rule of implied terms. It cited *Star Phoenix Mining Co. v. Hecla Mining Co.*, 130 Idaho 223, 939 P.2d 542 (1997) as authority. (Tr. pp. 123-125) As *Star Phoenix* points out, the implied terms rule has been applied by the Idaho Supreme Court in several decisions beginning in 1902. The wording of the rule varies slightly in those decisions. Regardless of the wording, however, that rule does not work to create a sale contract in this case.

The first decision to apply the rule was *Lane v. Pacific and Idaho Northern Railway Co.*, 8 Idaho 230, 67 P. 656 (1902) which expresses the rule this way:

> It is a well-established rule that where a party agrees to do a certain thing, and does not specify how it shall be done, the law implies a promise on his part to do it in the usual manner, and that it shall be complete and effectual for the use to which the same kind of thing is generally applied.

Id at 238, 67 P. at 658 (emphasis added). To apply the rule as expressed in *Lane* will have Ron selling the real property to Claire "in the usual manner" and have the sale structured with provisions "to which the same kind of thing is generally applied." Real estate transactions are not uniform, and a usual manner cannot readily be described. If such a manner could be described no evidence of it was given to the trial court. Further, it is doubtful that the manner implied by the court in this case, a title retaining installment contract, is a usual manner. See, *Thomas v. Klein*, 99 Idaho 105, 577 P.2d 1153 (1978) for reasons a contract for deed transaction is unwise.

Star Phoenix also cites *Commercial Insurance Co. v. Hartwell Excavating Co.*, 89 Idaho 531, 407 P.2d 312 (1965). That decision's wording of the implied terms rule is: "It is well settled that a contract includes not only what is stated expressly but also that which of necessity is implied from its language." *Id* at 541, 407 P.2d at 317. The sparse language in the option agreement provides nothing from which sale terms can be implied. There is no hint on what the remedy is in the event of default. Nor is there any language in the agreement from which to imply that Claire must pay property taxes but not fire insurance while the contract price is being paid.

A third Idaho decision cited in *Star Phoenix* is *Archer v. Mountain Fuel Supply Co.*, 102 Idaho 852, 642 P.2d 943 (1982). *Archer* involved a mining royalty contract and whether there was an implied term to perform mining operations and to generate royalty payments. The decision relies on a special rule for mining royalty cases, but it also states a general rule for implied terms by quoting from 17 Am. Jur. 2d Contracts:

> "[t]erms are to be implied in a contract, not because they are reasonable, but because they are necessarily involved in the contractual relationship so that the parties must have intended them and have only failed to express them because of sheer inadvertence or because they are too obvious to need expression."

Id at 857-858, 642 P.2d at 948-949. This version of the rule also will not work to create a contract from the option agreement. To apply the rule the missing terms must be relatively minor. In this case, what is needed for a complete contract are too numerous and too important to ascribe those omissions to the parties' inadvertence or to the term's obvious nature.

b.

The trial court created most of the contract for the parties. How the sale was structured and what the remedy would be upon default were provided by the court. By doing this the trial court exceeded the implied terms rule and made a contract for the parties. See, *Green v. Beaver State Contractors, Inc.*, 93 Idaho 741 at 743, 472 P.2d 307 at 309 (1970).

Specific performance of a contract cannot be granted if some of the terms are indefinite and uncertain or if those terms are left open for future determination. *Nolan v. Grim*, 67 Idaho 138 at 142, 173 P.2d 74 at 76 (1946). While the subjective understanding of one party to a contract is immaterial to the interpretation of that contract, *J.R. Simplot Co. v. Bosen*, 144 Idaho 611 at _____, 167 P.3d 748 at 751 (2006), Claire's trial testimony shows that the parties had left open some terms for later determination. When asked what would be the consequences if she did not pay one of the installments, Claire said, "I didn't even go into it because I knew we'd

make them." She answered the question on how the $100.00 credit was to be applied by saying, "You're an attorney. You interpret it." (Tr. p. 56, LL. 12-13 and 18-20) In this case the parties simply did not have a meeting of the minds on essential terms of a real estate sale.

VI. CONCLUSION

The trial court's factual finding that the option was exercised at the April 11 probate hearing is not supported by substantial and competent evidence, and its conclusion that the June 15 letter was an effective exercise of the option was erroneous. Further, the trial court's creation of numerous and substantial terms for the sale of real property was an improper application of the rule of implied terms.

Ronald Ward respectfully submits that the remedy of specific performance should not have been granted and that judgment should be reversed and the case dismissed.

RESPECTFULLY SUBMITTED on this 26th day of March 2008.

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CERTIFICATE OF SERVICE

I certify that two copies of this brief were hand delivered on March 26, 2008, to the office of:

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